

**MISSOURI COURT OF APPEALS  
WESTERN DISTRICT**

**STATE OF MISSOURI,  
RESPONDENT**

**vs.**

**HENRY R. RAMIREZ,  
APPELLANT**

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DOCKET NUMBER WD77540

DATE: OCTOBER 27, 2015

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Appeal from:

The Circuit Court of Jackson County, Missouri  
The Honorable Robert M. Schieber, Judge

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Appellate Judges:

Before Division One: Cynthia L. Martin, P.J., Joseph M. Ellis, J. and James E. Welsh, J.

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Attorneys:

Shaun Mackelprang, for Respondent

Susan L. Hogan, for Appellant

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## **MISSOURI APPELLATE COURT OPINION SUMMARY**

### **MISSOURI COURT OF APPEALS WESTERN DISTRICT**

**STATE OF MISSOURI, RESPONDENT**

**v.**

**HENRY R. RAMIREZ, APPELLANT**

WD77540

Jackson County, Missouri

Before Division One Judges: Cynthia L. Martin, P.J., Joseph M. Ellis, J. and James E. Welsh, J.

Appellant Henry Ramirez appeals from his convictions of one count of murder in the second degree, § 565.021, two counts of assault in the first degree, § 565.050, and three counts of armed criminal action, § 571.015. His convictions arise from an incident where he stabbed three men multiple times, one of whom died. Appellant contends that the trial court erred in refusing to instruct on the lesser-included instructions of voluntary manslaughter, involuntary manslaughter, and assault in the second degree.

**VACATED and REMANDED.**

**Division One holds:**

- (1) A defendant is entitled, upon request, to an instruction on a “nested” lesser-included offense and, therefore, does not have to introduce affirmative evidence or cast doubt over the State’s evidence in any way.
- (2) The sole differential element between second-degree murder and involuntary manslaughter is the culpable mental state, requiring the State to prove that the defendant acted with a different intent with respect to causing the victim’s death. Involuntary manslaughter is established by proving the defendant acted recklessly in causing the victim’s death while second degree murder is established by proving the defendant acted knowingly in causing the death.
- (3) Section 562.021.4 provides that “[w]hen recklessness suffices to establish a culpable mental state, it is also established if a person acts purposely or knowingly.” Therefore, where the evidence is sufficient to establish a person acted purposely or knowingly, there is no need for additional proof that the defendant acted recklessly. Accordingly, involuntary manslaughter is a nested lesser-included offense of second-degree murder.
- (4) The presence of sufficient evidence to establish that Appellant committed second-degree murder by knowingly causing the victim’s death necessarily means that there was also a basis in the evidence for the jury to convict

Appellant of involuntary manslaughter by recklessly causing his death. Accordingly, upon Appellant's request, the trial court was obligated to submit and instruction on the nested lesser-included offense of involuntary manslaughter and committed reversible error in failing to so instruct the jury.

- (5) Because Appellant's murder conviction and sentence must be vacated on this basis, we need not address whether the trial court also erred in refusing to give a voluntary manslaughter instruction.
- (6) As charged in this case, assault in the second degree is a nested lesser-included offense of assault in the first degree. The jury was instructed to find Appellant guilty of assault in the first degree if it found that he purposely stabbed the victim intending to kill or cause serious physical injury to him and thereby caused serious physical injury to him. A person commits the crime of assault in the second degree if he or she recklessly causes serious physical injury to another person. Therefore, under the circumstances of this case, the differential element between first-degree assault and second-degree assault is whether Appellant acted purposely or recklessly in causing serious physical injury to the victim by stabbing him.
- (7) When evidence is sufficient to establish a defendant acted purposely or knowingly, it is automatically sufficient to establish that the defendant recklessly acted. Thus, as charged, second-degree assault is a nested lesser-included offense of first-degree assault in that it is comprised of a subset of the elements of first degree assault.
- (8) Because there was sufficient evidence to prove the elements of the greater offense of first degree assault, there was, necessarily, sufficient evidence to prove the nested lesser-included offense of second-degree assault. Accordingly, the trial court committed reversible error by failing to instruct on assault in the second degree after such an instruction was requested.
- (9) Appellant's convictions for second-degree murder and first-degree assault are vacated. Because his convictions for armed criminal action are based upon his murder and assault convictions, they are also vacated.

Opinion by Joseph M. Ellis, Judge

Date: October 27, 2015

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